Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STERLING S. MILLER; CLARENCE WOODRUFF; PAULA J. CARTER; WILLIAM L. CLAY, JR.; and KENNETH H. JONES,

Petitioners,

vs.

VINCENT C. SCHOEMEHL; THOMAS A. VILLA; BOARD OF ALDERMEN, CITY OF ST. LOUIS, MISSOURI; BOARD OF ELECTION COMMISSIONERS, CITY OF ST. LOUIS; and CITY OF ST. LOUIS,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS SCHOEMEHL, VILLA, BOARD OF ELECTION COMMISSIONERS, BOARD OF ALDERMEN AND THE CITY OF ST. LOUIS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents[1] Schoemehl, Villa, Board of Election Commissioners of the City of St. Louis, Board of Aldermen of the City of St. Louis, and the City of St. Louis respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 93 F.3d 449.

STATEMENT OF THE CASE

Petitioners' Statement of the Case and Questions Presented contain mischaracterizations as well as assertions of fact that do not appear in the record. Respondents in this opposition brief refute those mischaracterizations and assertions where they are of particular significance to this Court's consideration of the petition.

The plaintiffs in *African American Voting Rights Legal Defense Fund, Inc. v. Villa* (referred to as the *AAVR* case), No. 4:92 CV 0044 JCH (E.D. Mo. June 17, 1992) filed their lawsuit in January 1992, alleging the City of St. Louis' ward boundary lines for selecting alderpersons and political party committee persons, as re-drawn after the 1990 census, violated the First, Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution and section 2 of the Voting Rights Act, 42 U.S.C. § 1973. (App. 10-27.)[2] The named plaintiffs consisted of the

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[1] For the sake of clarity and consistency, Respondents will refer to the style of this petition in the same manner as Petitioners. Respondents note however, that in the Eighth Circuit decision below the case is styled as *Tyus v. Schoemehl*, and also that pursuant to Federal Rule of Appellate Procedure 43(c)(1) and Supreme Court Rule 35.3, successors to the named public offices of Mayor and President of the Board of Aldermen should be automatically substituted as parties herein.

[2] References to the appendix filed in the Eighth Circuit are denoted as "App. ___.", and references to the Petitioners' appendix filed in this Court are denoted as "A-__ and B-__.".

African-American Voting Rights Legal Defense Fund, Inc. (a Missouri not-for-profit corporation) and various African-American residents of the City of St. Louis, including several elected alderpersons: Sharon Tyus, Freeman Bosley Sr., Bertha Mitchell, Claude Taylor, and Irving Clay, Jr. (App. 11-13.) The plaintiffs filed suit "on their own behalf and as a class action . . . on behalf of all black voters residing in the various wards of the City." (App. 13.)

On or about April 24, 1992, with a summary judgment motion pending against them, *AAVR* plaintiff-alderpersons Tyus, Bosley Sr., Mitchell, Taylor and Clay obtained new counsel, Mr. Judson Miner of the law firm of Davis, Miner, Barnhill & Galland. (App. 63-64.) Represented by Mr. Miner, these same plaintiffs — Tyus, Bosley Sr., Mitchell, Taylor and Clay — along with three additional persons, Sterling Miller (Ms. Tyus' spouse), Clarence Woodruff, and Paula Carter (an elected state representative), filed this second lawsuit, asserting the same claims as in *AAVR*. (App. 1-9; Eighth Circuit Rehearing Add. 1.) In this second suit, plaintiffs described themselves as "alderpersons of the City of St. Louis and/or are African American residents, citizens, and registered voters of the City," and they brought the suit "on their own behalf and on behalf of all African-American residents of St. Louis." (App. at 2.) At this point Mr. Miner served as counsel in both suits. (A-5.)

On May 5, 1992, Tyus, Bosley Sr., Mitchell, Taylor and Clay moved to withdraw from *AAVR* so that they could pursue their second lawsuit because of "certain disagreements regarding basic strategies with counsel" in *AAVR*. (App. 28-30.) On that same date, all plaintiffs in this second case filed a motion for reassignment based on relatedness, seeking to have the second suit reassigned to the district judge hearing *AAVR*, because the issues in the two cases were "virtually identical," the cases involved "the same issues in fact and law," and "the relief granted in one case will necessarily govern and control the relief

granted in the other." (App. 34-35.) Both motions were filed by counsel Mr. Miner.

In *AAVR*, the district court on June 17, 1992, granted summary judgment in favor of defendants, and denied the plaintiff-alderpersons' motion to withdraw as moot. The Eighth Circuit summarily affirmed, *AAVR v. Villa*, 999 F.2d 1301 (8th Cir. 1993) (Table) (per curiam), and denied rehearing. Several plaintiffs withdrew from *AAVR* at that point, but some appellants remained and sought a writ of certiorari, including alderpersons Tyus, Bosley Sr., Mitchell, Taylor and Clay, all represented by Mr. Miner. On the same date that this Court issued its opinion in *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), this Court granted the *AAVR* petitioners' request for certiorari, vacated the appellate court's judgment, and remanded for further consideration in light of *DeGrandy*. *Tyus v. Bosley*, 114 S.Ct. 2776 (1994). On reconsideration, the Eighth Circuit again affirmed, and then this Court denied certiorari. *AAVR v. Villa*, 54 F.3d 1345 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 913 (1996).

Meanwhile the district court in this second case had on March 3, 1993, granted summary judgment in favor of defendants Schoemehl, Villa, the Board of Aldermen, and the City of St. Louis on the ground of res judicata, and dismissed the claim against the Board of Election Commissioners as an entity not subject to suit.[3] (App. 112-20; B-1-8.) In its ruling, the district court also denied as moot plaintiffs' pending motion to file an amended complaint adding two additional persons as plaintiffs-- William Clay, Jr. (a state senator), and Kenneth Jones (an alderperson)-- and dropping as plaintiffs Tyus, Bosley Sr., Mitchell, Taylor, and Irving Clay. (App. 119; B-8.)[4] Plaintiffs

[3] The Board of Election Commissioners disputes that it is a proper party/ respondent in this action.

[4] Accordingly it is not clear that Petitioners William Clay, Jr. and Kenneth Jones have standing to bring this petition or that they were proper parties before the Eighth Circuit as they were never made parties below.

Miller, Woodruff, Carter, Jones, and William Clay appealed to the Eighth Circuit, which affirmed and denied rehearing. *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996).

Petitioners now request that this Court grant certiorari, arguing that the Eighth Circuit misapplied the doctrine of res judicata to bar them from relitigating issues identical to the ones decided in *AAVR*.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Eighth Circuit's Application of the Doctrine of Res Judicata Under the Factual Circumstances Of This Case Neither Conflicts With Other Circuit Decisions Nor Is It Inconsistent With *Richards v. Jefferson County, Ala.*

In a twenty-four page opinion, the Eighth Circuit carefully and methodically applied the doctrine of res judicata to the unique factual circumstances at hand. The court concluded that issue preclusion prevented the plaintiffs from relitigating the issues previously decided in *AAVR* in that the plaintiffs in this case were "virtually" or "adequately" represented by the plaintiffs in *AAVR*. In so concluding, the Eighth Circuit noted that both suits raised "identical claims," that the issues raised in the second suit were actually litigated and decided in *AAVR*, and that accordingly the only question before it was whether the plaintiffs in the second suit were in privity with or adequately represented by the *AAVR* plaintiffs.[5] (A-1, 9-10.)

In undertaking an equitable and fact-intensive inquiry into privity or adequate representation, the court, contrary to petitioners' suggestion, did not enhance or create conflict with other circuits. While acknowledging that some circuits in their privity inquiries have applied the concept of virtual or adequate representation more broadly than others, the Eighth Circuit correctly noted that there can be no clear test in applying the concept due to its factually intensive nature. (A-12.) Rather, the court stated, it is wisest to apply the doctrine in light of the relevant factual context, weighing carefully the concerns of due process and judicial economy. (A-13.)

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[5] While Petitioners draw a distinction between privity and adequate representation, the Eighth Circuit's opinion characterizes adequate representation as one category of privity. (A-11.) Regardless, it is clear that adequate representation refers to an inquiry assessing the applicability of res judicata.

In its inquiry, the court followed "several guiding principles" of res judicata accepted in other courts. (A-15.) Petitioners' suggestion that the court should not have cited to *Petit v. City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991) is misplaced, as *Petit* is quite analogous to the instant case, and there is no basis for Petitioners' assertion that *Petit* is anything less than valid law. Similarly, Petitioners are simply wrong when they suggest that the Fifth Circuit has "abandoned" its reasoning from *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). On the contrary, the Fifth Circuit still recognizes the virtual representation principle, albeit more limitedly than originally stated, and still cites *Aerojet* for the applicable legal standard. *See Meza v. General Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990).

Further, in its opinion below, the Eighth Circuit was particularly mindful of *Richards v. Jefferson County Ala.*, __ U.S. __, 116 S. Ct. 1761 (1996). The court expressly recognized the due process concerns articulated in *Richards*, distinguished *Richards* as a case in which the parties to the two lawsuits were "mere 'strangers' to one another," and determined *Richards* to be inapposite where there is the type of relationship between the parties as found in this case. (A-13-14.) Indeed, *Richards* recognizes that privity extends to describe various relationships that would not have come within the traditional definition of the term. 116 S.Ct at 1766. Moreover, *Richards* addressed a situation where the second group of plaintiffs, whose interests were not necessarily aligned with the first group of plaintiffs, sought to litigate new and different federal claims that had not been raised or litigated in the prior suit. *Id.* Finally, contrary to petitioners' assertion, this case would not present any question left unanswered in *Richards* regarding the necessity of notice of the prior litigation, as the court below concluded the plaintiffs in this suit were on notice of the first suit; indeed certain of the plaintiffs were parties to the first suit. (A-19, 24).

II. The Petition Should Be Denied Because Petitioners' Allegation That They Were Denied Due Process Does Not Justify A Grant of Certiorari Where the Eighth Circuit Properly Applied the Doctrine of Res Judicata Under the Factual Circumstances of This Case To Bar Petitioners From Relitigating Claims and Issues Identical to Those Decided In a Prior Case Which Included Many of the Same Plaintiffs, the Same Counsel, and Other Plaintiffs With Identical Interests.

Petitioners also contend that this Court should grant certiorari because they were deprived of due process in that they and the issues they raise deserve another day in court. This portion of the Petition for Certiorari is essentially a rehash of Petitioners' argument to the Eighth Circuit that they were not adequately represented in the first suit.

As explained in Respondents' statement of the case, as well as in the Eighth Circuit opinion below, this is a case in which a group of plaintiffs, with a summary judgment motion pending against them in federal court, opted to file a second simultaneous lawsuit in federal court raising identical claims and issues. Three additional plaintiffs, all situated similarly to plaintiffs in the first suit, joined in the filing of the second suit. As the record below evinces, and as the Eighth Circuit recognized in its decision, the principal reason for filing the second lawsuit was as a "tactical maneuver"–"to evade judgment in the first suit." (A-19, 24.) Five of the plaintiffs in this second suit were *AAVR* plaintiffs who deliberately maneuvered to avoid the first suit once it became apparent that they might not prevail. Counsel from Spring of 1992 forward was the same in both suits. All plaintiffs in the second suit sought to have their case reassigned to the district judge presiding over *AAVR* because the issues were "identical" and the outcome of one suit would "necessarily govern" the outcome of the other. (App. 34-35.)

This scenario certainly involves a unique application of virtual or adequate representation principles which is not likely to recur, and this Court's review of whether these Petitioners deserve to maneuver another day in court would not serve any need among the courts for guidance on res judicata doctrines.

III. The Petition Should Be Denied Because Petitioners' Asserted "Questions Presented For Review" Would Not Actually Be Presented To This Court In That The Asserted Questions Are Premised On Factual Scenarios Not Present In This Case

Petitioners' asserted Questions Presented would not be before this Court as the Eighth Circuit did not apply res judicata against a factual scenario like the one premised in Petitioners' Questions. Petitioners attempt to mischaracterize the factual scenario as one in which they had no relationship to the plaintiffs in the prior *AAVR* litigation and had no notice of the *AAVR* suit. (Petition for cert. at i.) These assertions are contrary to the lower courts' conclusions and are not supported by the record, as explained in Respondents' arguments above.

Similarly, Petitioners' assertion that this case is one in which the prior litigation was not prosecuted with "due diligence and reasonable prudence" (petition for cert. at i), is unsupported in the record and was not a conclusion reached by either of the lower courts. (See B-5-6.) In fact, Petitioners' counsel Mr. Miner pursued the first suit through appeals which extended into 1996. This line of argument amounts to nothing more than yet another rehash of Petitioners' hindsight assessment of and dissatisfaction with the ultimate outcome of *AAVR*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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